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No. 1230

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

JOSEPH ABODEELY,

Appellant,

vs.

THE PEOPLE OF THE STATE OF IOWA,

Appellee.

On appeal from the Supreme Court of Iowa.

JURISDICTIONAL STATEMENT

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OCTOBER TERM, 1970

NO.

THE PEOPLE OF THE STATE OF IOWA,
Appellant,

vs.

JOSEPH ABODEELY,
Appellee.

On appeal from the Supreme Court of Iowa.

JURISDICTIONAL STATEMENT

The Appellant, Joseph Abodeely, appeals from the judgment of the Supreme Court of Iowa entered on October 15, 1970 affirming a judgment of conviction of the crime of aiding and abetting a confederate in an attempt to commit abortion entered in the District Court of Linn County Iowa and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the Supreme Court of Iowa is not yet reported. A copy of the said opinion is attached hereto as Appendix A.

Jurisdiction

Appellant was charged by county attorney's information with aiding and abetting a confederate in an attempt to commit abortion in violation of Iowa Code Section 701.1. He pled guilty, was sentenced to an indeterminate sentence not to exceed five years in the Iowa State Penitentiary, fined $100.00 and costs. Subsequently he filed a motion in arrest of judgment and to vacate sentence. The motion was overruled.

The Iowa Supreme Court's opinion affirming the lower court's judgment was entered on September 2, 1970 and the Petition for Rehearing was denied on October 15, 1970. A copy of said opinion is attached hereto as Appendix B.

The Court has jurisdiction under Title 28, United States Code, Section 1257(2) to entertain a direct appeal, where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States and the decision below is in favor of its validity. Drawn into controversy by this appeal are two questions attacking the validity of Iowa's anti-abortion law (701.1) and county attorney's information (§769.2) under the Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States; and whether the appellant was afforded due process under the Fifth Amendment to the Constitution of the United States as required by this Court's decisions in *McCarthy* v. *United States,* 394 U.S. 459 (1969) and *Boy-*

kin v. *Alabama,* 395 U.S. 238 (1969) which were decided prior to the appellant's plea of guilty.

The Iowa Supreme Court, in its opinion, decided that the Iowa anti-abortion law was constitutional based solely on the ground that the phrase, "unless such miscarriage shall be necessary to save her life" found in the Iowa statute has been clear enough for satisfactory use for over 100 years and should not now be the occasion for declaring the statute unconstitutional. In upholding the constitutionality of county attorney's information the Iowa Supreme Court held that prosecution by indictment has not been found to be so fundamental to the American scheme of justice as to come within the ambit of the Fourteenth Amendment and that prosecution by information has not been proscribed by federal edict.

In several jurisdictions, Washington, D.C.; California (State); Wisconsin (Federal three judge panel); Pennsylvania; Texas (Federal three judge panel); Georgia (Federal three judge panel);* state anti-abortion statutes have been struck down as being unconstitutionally vague and uncertain and in violation of a woman's right to life and to bear children. There is presently pending before this Court for review an appeal by the United States in the case of *United States* v. *Vuitch,* 305 F.Supp. 1032 (D.C.D.C. 1969).

This appellant hereby adopts and incorporates by reference the brief in the *Vuitch* case insofar as the vagueness and right of privacy arguments are concerned.

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* *People* v. *Belous,* 458 P.2d 194, cert. den. 397 U.S. 915 (1970); *U. S.* v. *Vuitch,* 305 F.Supp. 1032 (D.C.D.C. 1969); *Babbitz* v. *McCann, et al.,* 310 F.Supp. 293 (E.D. Wisc., 1970), cert. den. ..... U.S. .....; *Roe* v. *Wade,* 314 F.Supp. 1217 (N.D. Tex. 1970); *Doe* v. *Bolton,* ..... F.Supp. ..... (N.D. Ga. 1970); *People* v. *Page,* 8 CRL 2222 (Pa. Comm. Pleas Ct., 1970).

The last pronouncement by this Court as to the application of the Fifth Amendment's indictment clause to the States through the Fourteenth Amendment is *Hurtado* v. *California,* 110 U.S. 516 (1884) which the Iowa Supreme Court relied on to sustain the validity of Iowa's county attorney's information. This Court in recent decisions has engrafted upon the States all the Fifth Amendment's provisions except for "indictment of a Grand Jury." In view of the fact that Hurtado dealt with prosecution by information after hearing and examination by a magistrate thus guaranteeing to a person charged with a felony at least a minimum of due process this Court is urged to consider anew the constitutionality of Iowa's county attorney's information under the Fifth Amendment.

QUESTIONS PRESENTED

1. Whether the statute under which the appellant was convicted which forbids any person from producing a miscarriage of a woman unless necessary to save life is contrary to the due process clauses of the Fifth and Fourteenth Amendment to the Constitution of the United States as being constitutionally vague and indefinite and contrary to the Ninth Amendment to the Constitution of the United States of America as infringing upon a woman's right to life and to bear children.

2. Whether the trial court's failure to inform the appellant of his constitutional rights required by *Boykin* v. *Alabama,* 395 U.S. 238 (1969) and *McCarthy* v. *United States,* 394 U.S. 459 (1969) in a post *Boykin* guilty plea violated the appellant's rights under the due process clauses of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States.

3. Whether the appellant's rights under the Fifth and Fourteenth Amendments to the Constitution of the United

States were violated when he was charged with a felony by a county attorney's information and without presentment for indictment to a grand jury.

STATUTES INVOLVED

Iowa Criminal Code, Section 701.1:

> "If any person, with intent to produce the miscarriage of any woman, wilfully administers to her any drug or substance whatever, or, with such intent, use any instrument or other means whatever, unless such miscarriage shall be necessary to save her life, he shall be imprisoned in the penitentiary for a term not exceeding five years, and be fined in a sum not exceeding one thousand dollars."

Section 769.2:

> "The county attorney may, at any time when the grand jury is not actually in session, file in the district court an information charging a person with an indictable offense. . ."

STATEMENT

A.

Facts

Appellant was accused of having confederated with Merle Jess Meyers and Donald Ray Geater in attempting to produce a miscarriage by Gloria Jean Judd. The actual work on the women was done by Meyers, who appellant believed to be a doctor, with the assistance of Geater. The State charged appellant as an aider and abettor. The evidence indicates appellant, who is the owner of a bar, acted as a referral source.

Appellant claims he received no financial gain, but said that upon the desperate request of a girl in trouble he

told her of Meyers, whom he never met, and Geater. Testimony of Geater produced by the State at the hearing preparatory to sentencing indicates appellant did likely realize a financial gain.

B.

Dialogue Between Trial Court and the Defendant At Time of Plea

The trial court informed the appellant on June 12, 1969 that he was charged with attempting to produce abortion in violation of Iowa Code Section 701.1 and that this Section provides as a maximum punishment, imprisonment in the penitentiary for a period not exceeding five (5) years and a fine in a sum not exceeding $1,000.00. (R.p. 4, ll. 28-33*)

The defendant was asked whether the decision to plead guilty was his own voluntary decision and he replied that it was. The defendant was asked if anybody induced him to plead guilty by means of threats or promises. The appellant replied that no such threat or promise had been made. (R.p. 5, ll. 11-19).

C.

Failure of the Trial Court to Inform the Appellant of His Rights

The trial court never explained to the appellant the nature of the charge of attempting to produce an abortion. The appellant placed the trial court on notice that he did not understand the charges and the acts and intent necessary to commit the offense when the appellant said he thought the charges were aiding and abetting and not

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* "R." refers to the Record of the appellant filed in the Iowa Supreme Court.

attempting to produce an abortion. (R.p. 6, ll. 6-7) Even then an explanation of the intent and acts necessary to commit the offense of attempted abortion was not offered by the trial court.

The trial court did not inform the appellant of his privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the State by reason of the Fourteenth Amendment. (That is that the appellant could choose whether or not to be a witness during his trial and that if he chose not to become a witness, he could not be forced to do so by the State.) The trial court did not inform the appellant of his right to trial by jury, and that he would waive this right to trial by jury if he entered a plea of guilty. The trial court did not tell the defendant that he had the right to confront his accusers, that is to be present during the testimony of all State witnesses and to cross-examine such witnesses. The trial court did not tell the appellant that if he entered a plea of guilty he would also waive his right to confront these witnesses.

The trial court did not inform the appellant as to the scope of the punishment. The trial court never stated that, according to law, he was required to give the maximum sentence of five (5) years imprisonment, if he did not grant the defendant probation. There was no explanation that the sentence was an either/or situation, that is five (5) years imprisonment or probation. (R. pp. 3-7).

D.

Sentencing Hearing

During the sentencing hearing and prior to the entry of judgment the appellant again put the trial judge on notice that he believed he was not guilty of the offense

of attempting to commit abortion. The defendant stated that "I never was part of an abortion ring." (R.p. 30, ll. 29-30). The appellant maintained that he never realized that during this period that he was personally violating the law. (R.p. 31, ll. 21-22). Counsel for the appellant asked him whether he agreed to plead guilty only when counsel informed him that *no matter how innocent or minor* his participation, he was *still guilty.* The appellant replied that that was correct. (R.pp. 31-32). The appellant stated that he never participated in an abortion at all, and that he never solicited anyone to have an abortion. (R.p. 32, ll. 33-34). The appellant testified that he did not believe that his acts constituted an illegal type activity, since he did not perform or assist in the abortion. (R.pp. 33-34).

E.

Hearing on Motion in Arrest of Judgment and to Vacate Sentence

Ted V. Ruffin, an attorney, began representing the appellant, Abodeely, in this case in March, 1968. Mr. Ruffin told the appellant that he did not have a chance to be found not guilty in Linn County, because of the prejudicial and intense publicity concerning this case. (R.p. 16, ll. 1-7).

Mr. Ruffin told appellant that the appeal of the denial of his motion for a change of venue would likely be successful only in the Supreme Court of the United States and that such an appeal would be time consuming and financially oppressive. (R.p. 16, ll. 9-17). Mr. Ruffin felt that Abodeely was greatly concerned about the publicity and he did not know whether Abodeely or his family were able to withstand the public harassment and crank phone calls. (R.p. 16, ll. 21-27). Mr. Ruffin testified that even at a time when there was a likely recommendation of

probation from the County Attorney's office, the appellant refused to plead guilty because he said he was not guilty of the charges. (R.p. 17, ll. 4-12). A short time before the trial date of June 12th, Mr. Ruffin informed Abodeely that if he insisted on pleading not guilty, Mr. Ruffin would withdraw as his attorney. (R.p. 17, ll. 25-33). Mr. Ruffin discussed the County Attorney's true information and witnesses with the appellant (R.p. 20, ll. 10-12). Mr. Ruffin believed that the appellant knew that if he went on trial there would be a jury. (R.p. 20, ll. 16-18).

Mr. R. Fred Dumbaugh was also an attorney who represented the appellant in this case. Neither Mr. Dumbaugh or Mr. Ruffin ever told Abodeely that the sentence was either a five (5) year maximum imprisonment or probation and Abodeely could have felt that he could get a one (1) year or two (2) years sentence with probation. (R.p. 21, ll. 22-29). Mr. Dumbaugh mentioned that Abodeely's chances of getting probation, if he entered a plea of guilty would be 80 to 90 percent. (R.p. 22, ll. 7-9). Mr. Dumbaugh testified that throughout this period the appellant did not believe himself to be guilty of a criminal offense. (R.p. 22, ll. 13-16). Mr. Dumbaugh stated that Abodeely reluctantly accepted a plea of guilty only because he was told that a successful trial in Cedar Rapids was impossible and that a plea of guilty was the only way to relieve himself and his family from the harassment of the newspapers. (R.p. 22, ll. 27-34).

Abodeely testified that when he entered his plea of guilty, he did not believe that he was guilty, because he felt that it was not a crime to help a person in desperate need of help. He felt that he was not guilty because he did not actually help or attempt or assist anybody in an abortion or participate in an abortion at any time. He

received no money or gain from an abortion. (R.p. 25, ll. 12-21). Abodeely testified he entered a plea of guilty even though he felt he was not guilty because his lawyers told him *that no matter how minor or innocent his participation in this case was, he still was guilty.* His lawyers further told him that he could not be found not guilty in Linn County, because of the prejudicial publicity and the only way to get rid of the prejudicial publicity was to plead guilty. (R.p. 25, ll. 22-34). Four (4) days before the plea of guilty, his attorney, Mr. Ruffin, told the defendant that he would withdraw if he did not plead guilty. (R.p. 26, ll. 1-3). At the time he pleaded guilty, Mr. Abodeely did not know that the penalty for the offense was either probation or five (5) years in jail. Mr. Abodeely thought that the possibility of the sentence in relationship to what the judge had said would be either probation or a sentence of 0 to 5 years, not to exceed 5 years, the maximum sentence. (R.p. 26, ll. 20-27).

THE QUESTIONS ARE SUBSTANTIAL

1 A. The appellant was charged with a violation of Section 701.1 of the Iowa Criminal Code which provides:

> "If any person, with intent to produce the miscarriage of any woman, willfully administers to her any drug or substance whatever, or, with such intent, use any instrument or other means whatever, unless such miscarriage shall be necessary to save her life, he shall be imprisoned in the penitentiary for a term not exceeding five years, and be fined in a sum not exceeding one thousand dollars."

In *People* v. *Belous,* 458 P.2d 194 (Calif. 1969) cert. den. 397 U.S. 915 (1970) the Supreme Court of California held the California anti-abortion law to be unconstitutional in

that it was vague and uncertain and therefore did not satisfy due process requirements. The California statute which is almost identical to that of Iowa provides:

> "Every person who provides, supplies, or administers to any woman, or procures any women to take any medicine, drug or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the msicarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than two nor more than five years."

Specifically the phrase "unless the same is necessary to preserve her life" was held not sufficiently certain to satisfy due process of law requirements. Section 701.1 of the Iowa Code is worded in virtually the same language except for the phrase "necessary to save her life."

In *Lanzetta* v. *New Jersey,* 306 U.S. 451, relied upon by *Belous,* this court held that when a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, such statute violates the first essential of due process of law, (p. 453).

This Court should hold that Section 701.1 of the Iowa Criminal Code to be unconstitutional as vague and uncertain.

B. The Iowa anti-abortion law is unconstitutional on another ground in that it is an unwarranted invasion of privacy and an infringement upon a woma's right to life and to bear children.

Recently the Pennsylvania Court of Common Pleas, Centre County, in *Commonwealth* v. *Page,* 8 CRL 2222 (1970) considered the Pennsylvania anti-abortion law

which is similar to Iowa's in that it prohibits "any person" from causing a miscarriage. The defendant in *Page* was a truck driver, unskilled in medical practice, who performed the abortion. The defendant in *Page* entered a plea of guilty. The court in holding the Pennsylvania anti-abortion law unconstitutional reasoned that:

> "We can readily perceive of a valid compelling interest of the State in the subject of abortion if it were directed, for example to prevent an unqualified, unlicensed and untrained individual to perform an abortion which medically would jeopardise the health and safety of the woman involved but, in order to accomplish the result in which the state is interested, the statute must be sufficiently narrow in scope to serve the limited purpose involved: McLaughlin v. Florida, 379 U.S. 184; Shelton v. Tucker, 364 U.S. 479.
>
> We flatly hold that the Pennsylvania statute does not meet this standard because of its broad unlimited and indiscriminate application. * * *
>
> We believe the rationale of the case of Griswold v. Connecticut, supra, is applicable and may be extended to abortive action after conception and that the abortion statute interferes with the individual's private right to have or not to have children. Both the Pennsylvania and Connecticut statutes are at odds with current medical practice, both invade the intimate realm of marital privacy, both interfere with a married couple's freedom to control the number and spacing of offspring, and both are in conflict with a solution of one of the world's critical problems, the population explosion. * * *
>
> We are convinced that the Pennsylvania abortion statute clearly impinges on constitutionally protected areas and without a doubt it is so broad, unlimited and indiscriminate that it fails to meet the present day tests for constitutionality."

> "Where there is a significant encroachment upon personal liberty the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock,* 261 U.S. 516, 524; 4 L.Ed. 480, 486.

There is no compelling State interest sufficient to override the infringement on the personal liberty of a woman affected by the statute here being challenged. Even were legitimate State interest present, "that purpose cannot be pursued by means (as here) that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker,* 365 U.S. 479, 488; 5 L.Ed.2d 231.

The right of a woman not to be compelled to bear a child must be considered a personal right of the most intimate and highest moment. This was recognized by the United States Supreme Court in the matter of contraception in *Griswold* v. *Connecticut,* 381 U.S. 479; 14 L. Ed. 2d 510. The right there was found to lie "within the zone of privacy created by several fundamental guarantees" (381 U.S. at 485). If "the right to have off-spring" is a "constitutionally protected human right" which cannot be taken away by a discriminatory statute requiring the sterilization of some persons convicted of crime (*Skinner* v. *Oklahoma,* 316 U.S. 535 at 536), then the right not to have offspring enjoys similar constitutional protection.

In *People* v. *Belous,* the California Supreme Court reasoned, (p. 359), that:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right to privacy' or 'liberty' in matters related to marriage, family and sex. *Griswold* v. *Connecticut,* 381 U.S. 479; *Loving* v. *Virginia,* 388 U.S. 1, 12; 18 L. Ed. 2d 1010 (statute prohibiting interracial marriages held violative of the due process clause)."

Recently, a three-judge court sitting in the United States District Court, Eastern District of Wisconsin (Milwaukee), headed by Judge Kerner of the Seventh Circuit Court of Appeals, held unconstitutional a somewhat similar statute (Sec. 940.04 Wis. Stats.) as the one at bar. *Babbitz* v. *McCann,* 310 F. Supp. 293. The three-judge court held "upon a balancing of the relevant interest, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the State without a more compelling public necessity than is reflected in the statute in question. When measured against the claimed 'right' of an embryo of four months or less, we hold that the mother's right transcends that of such an embryo." And recently also, a District Court in the District of Columbia invalidated an abortion law in slightly different language. *United States* v. *Vuitch,* 38 L. W. 2275 (Nov. 10, 1969). The court in *Vuitch* observed·

> "There has been moreover, an increasing indication in decisions of the Supreme Court of the United States that as a secular matter, a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in the early stages of pregnancy."

See also *Roe* v. *Wade,* ..... F.Supp. ..... (N.D. Tex. 1970); *Doe* v. *Bolton,* ..... F.Supp. ..... (N.D. Ga. 1970).

Accordingly, the Iowa Abortion Statute is unconstitutional.

2. Prior to the acceptance of the defendant's guilty plea on June 12, 1969, the trial court failed to comply with the requirements of *McCarthy* v. *United States,* 394 U.S. 459 (1969) and *Boykin* v. *Alabama,* 395 U.S. 238 (1969). In the *McCarthy* case, decided on April 2, 1969, it became mandatory upon Federal District Court judges, prior to an acceptance of a guilty plea, to personally, inform the

defendant of the nature of the charges against him and that if the defendant entered a plea of guilty, he waived certain constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. The *Boykin* case, decided on June 2, 1969, required state court judges to personally inform defendants of these same rights prior to the acceptance of a guilty plea.

In both the *McCarthy* and the *Boykin* cases the defendant, as here, had entered his plea of guilty and judgment and sentence had been pronounced prior to the attack upon the plea.

The defendant, Abodeely, pled guilty on June 12, 1969, some ten (10) days after *Boykin* and therefore the trial court here was bound by the mandate of the *Boykin* decision.

In his ruling on the post sentence motions, the trial court apparently conceded that his dialogue with the defendant, Abodeely, did not meet the requirements of *Boykin.* (R.p. 55, ll. 17-20). However, the trial judge concluded that he was not bound to inform the defendant of these specific constitutional rights, since the Iowa Supreme Court ruled, on September 5, 1969, in *State* v. *VanTrump,* 170 N.W.2d 453 that its decision in *State* v. *Sisco,* 169 N.W.2d 542, decided July 24, 1969, was not to be applied retroactively. This conclusion is unwarranted, since the decision in *Boykin* is binding here and that decision was prior to the acceptance of the defendant, Abodeely's, plea of guilty. In *Sisco,* the Iowa Supreme Court dealt with a plea of guilty entered prior to the *Boykin* and *McCarthy* decisions. In the *Sisco* case, though not bound by *Boykin,* since the plea was made prior to June 2, 1969, the Iowa Supreme Court utilized the reasoning of *Boykin* and *McCarthy* to

vacate the plea. In *VanTrump* a case involving another pre-*Boykin* guilty plea, the Iowa Supreme Court limited the requirements in pre-*Boykin* pleas to the *Sisco* case and then announced that the ruling of *Sisco,* which also adopted the American Bar Association's Project on Minimum Standards for Criminal Justice, was prospective. Nothing in *Sisco* or *VanTrump* relieves a state trial court from following the court's mandates in *Boykin* and *McCarthy* in a post-*Boykin* guilty plea.

The Iowa Supreme Court held in this case that it was constitutionally bound by the United States Supreme Court's mandate in *Boykin* v. *Alabama,* 395 U.S. 238, rendered on June 2, 1969, but held that " . . . *Boykin* did not attempt to impose a rule of criminal procedure mandating the *manner* by which the record was to be developed." (App.A. 7). Contrary to this opinion the primary purpose of *Boykin* was to establish a *manner* by which the defendant was to gain knowledge of his rights. *Boykin* specifically held, at page 243 and 244, that the *judge himself must discharge the function of warning the defendant on the record* prior to the acceptance of the guilty plea.

This court in *Boykin,* at page 242, stated that "The plea of guilty is more than a confession which admits that the accused did various acts; it is itself, a conviction." *Miranda* v. *Arizona,* 382 U.S. 436, held that a suspect must be informed by his interrogator of certain specific rights. The question under *Miranda* is not whether or not the statement was given voluntarily, but the question is whether or not the specific *Miranda* warnings were given. *Boykin* uses the same reasoning in requiring the judge himself to make specific warnings prior to the acceptance of a guilty plea.

The Supreme Court of Iowa utilized the method specifically disapproved in *Boykin,* that is, depending on "collateral proceedings that seek to probe murky memories." The opinion here ignores the complete inadequacies of the trial court's statement to the defendant and instead relied on extraneous factors occurring prior to Abodeely's plea and the hearing held on June 12, 1969, such as Abodeely's educational and business background; his awareness of the disposition of the case of two persons who had been separately indicted for attempted abortions; his various conferences with attorneys and their pre-trial and pre-plea activities; his *presence* during hearings on various pre-trial motions; and his short attendance at an unrelated criminal trial. (App. A. 8-9).

This opinion disregarded Abodeely's claim that he was innocent. When the trial court became aware of the fact that he felt he was innocent, it was duty bound on its own motion to withdraw Abodeely's plea of guilty, enter the plea of not guilty and put Abodeely to trial. The attorneys who counseled Abodeely concerning the law of aiding and abetting in the attempt to produce an abortion completely abdicated their roles as advocates and assumed the roles of antagonists. One glaring example of this was their advice to Abodeely that no matter how innocent he was or how minor his participation, he was still guilty under Iowa law.

Even in looking at the extraneous matters to determine voluntariness, the Iowa Supreme Court misunderstands the rights a defendant is entitled to know before entry of a plea of guilty. At page 8 of the opinion it is stated that the appellant was aware of his Fifth Amendment right to remain silent because his attorneys told him that he could not afford to take the witness stand. The constitu-

tional right under the Fifth Amendment required by *Boykin* is that the defendant must know that if he goes to trial he can not be compelled by the State to be a witness. Concerning all the rights enumerated in *Boykin,* including the confrontation of witnesses, the trial court must make the defendant understand that not only does he have these rights, but that he will be waiving these rights if he enters a plea of guilty.

The Iowa Supreme Court further held at page 6 of its opinion:

> "Although *McCarthy* was decided April 2, 1969 before the plea in this case was taken, it was not binding on the trial court, nor is it binding on this court, because it limits itself to federal procedural problems."

What the opinion failed to realize is that *Boykin* specifically made the holdings of *McCarthy* applicable to state court cases. Since the plea of the appellant, Abodeely, was made after the *Boykin* case the procedure required by both *McCarthy* and *Boykin* are applicable here. It is noteworthy that prior to *McCarthy* or *Boykin* the Iowa Supreme Court in *State* v. *Rife,* (Iowa, 1967) 148 N.W. 2d 846 and *State* v. *Cooper,* (Iowa, 1968) 161 N.W. 2d 728 adopted, as the best procedure to follow by lower courts when accepting pleas of guilty, the provisions of Amended Rule 11, Federal Rules of Criminal Procedure.

Since the trial court failed to inform the defendant of his constitutional rights under *Boykin* and *McCarthy,* the plea was involuntary and the motion in arrest of Judgment and to Vacate the Sentence should have been granted.

At the time of the entry of a plea the trial court has an obligation to inform the defendant of the range of punishment he might receive. *State* v. *Rife,* 148 N.W. 2d 846 (1967) and *State* v. *Cooper,* 161 N.W. 2d 728 (1968). The

court here merely told the appellant that Section 701.1 of the Iowa Code provides as punishment "imprisonment in the penitentiary for a term not exceeding five (5) years. Abodeely was not told that it was mandatory upon the trial court to sentence the defendant to the maximum term of five (5) years if probation were not granted. The appellant could not be said to be aware of the consequences of his plea if he is not informed of a mandatory minimum requirement. Abodeely testified that had he known at the time of sentencing of this mandatory minimum requirement, he would not have entered a plea of guilty. (R.p. 27, ll. 3-6).

In *Kercheval* v. *United States,* 274 U.S. 220, 47 S.Ct. 582 (1927) this court said:

> "Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice *and with full understanding of the consequences.*"

In *Freeman* v. *United States,* 350 F.2d 940 (9th Cir. 1965) the court in vacating a plea of guilty stated at page 943 that "if he (defendant) has pleaded in ignorance of the possibilities he should be permitted to withdraw his plea. Rule 11 which requires the judge to satisfy himself that a guilty plea is voluntary, can not be interpreted to mean anything less will suffice than a complete understanding of the possible sentence."

The American Bar Association, Project on Minimum Standards for Criminal Justice, Pleas of Guilty, Approved Draft, provides in pertinent part:

> "1-4 Defendant to be advised on this by court.
>
> The court should not accept a plea of nolocontendere or guilty from a defendant without first addressing

> the defendant personally and completely informing him . . . of the mandatory minimum sentence, if any, on the charge."

Failure of the trial court to inform the defendant of the scope and range of the possible punishment rendered the plea involuntary.

3. The appellant Abodeely was charged by county attorney's information returned on October 24, 1968. Amendment 3, 1884, Constitution of the State of Iowa and Iowa Code, Chapter 769, section 769.2 authorizes the procedure followed in this case.

Section 769.2 provides, in pertinent part, as follows:

> "The county attorney may, at any time when the grand jury is not actually in session, file in the district court an information charging a person with an indictable offense * * *."

The Iowa Supreme Court has sanctioned county attorney's informations, and has declared that the procedure followed in charging a person with a felony under section 769.2 and its predecessor, is not in violation of the Fifth[1] or Fourteenth[2] Amendments to the Constitution of the United States. *State* v. *Allnut,* 158 NW2nd 715 (Iowa 1968), *Kotek* v. *Bennett,* 225 Iowa 984, 124 NW2nd 710 (1963).

An analysis of *State* v. *Allnut* and *Kotek* v. *Bennett,* as well as all other Iowa cases researched in this area, dis-

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[1] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger * * *."

[2] "Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property: without due process of law; * * * "

closes that the rationale employed in reaching the conclusion that prosecutions of felonies founded upon county attorney's informations are not violative of the provisions of the Fifth or Fourteenth Amendments is simply that the provisions of said Amendments are not binding or a limitation upon the conduct of State criminal cases and involve matters reserved to the individual States. (It is here noted that there are no legislative records available which would furnish any evidence of legislative intent concerning the use of county attorney's informations).

The keystone case upon which it appears that the Iowa law in this area is bottomed is *State* v. *Ostby,* 203 Iowa 337, 212 NW 550 (1927) in which the Iowa Supreme Court held that felony prosecutions upon county attorney's information were not violative of the provisions of the Fifth Amendment's requirement that all infamous crimes must be prosecuted upon presentment or indictment of a grand jury or of the Fourteenth Amendment's due process clause. *State* v. *Ostby,* in turn, relied upon *Barron* v. *The Mayor and City Council of Baltimore,* 7 Pet. 243, 8 Led 672 (1883), which dealt with the taking of private property by the City of Baltimore for public use and for which the owner was compensated.

The threshold question in the *Barron* case was whether this court had jurisdiction to determine whether the Fifth Amendment's provisions inhibiting the taking of private property for public use without just compensation was a limitation upon the States. The Supreme Court held that said provisions were not a restriction or limitation upon the powers of the State but was intended solely as a limitation on the exercise of power by the government of the United States.

However, it is pointed out that *Barron* v. *The Mayor and City Council of Baltimore* case was decided thirty-five years prior to the adoption of the Fourteenth Amendment and subsequent thereto this court has had occasion to address itself to this question and has squarely held that the Fifth Amendment's requirements of "just compensation" applies to the States through the Fourteenth Amendment. Reliance upon *Barron* by the Iowa Supreme Court in *State* v. *Ostby,* decided in 1927, was erroneous and it is respectfully submitted that the constitutionality of section 769.2 should be reviewed in the light of this court's decisions interpreting and imposing upon the States, through the due process clause of the Fourteenth Amendment, various provisions of the so-called Bill of Rights[3] and, specifically, of the Fifth Amendment.

The latest expression of this court's dealing with the application in State criminal proceedings of provisions of the Fifth Amendment through the due process clause of

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[3] The Sixth Amendment's right to trial by jury, *Duncan* v. *Louisiana,* 391 U.S. 145, 20 Led 2d 491, 88 SCt 1444 (1968), to counsel, *Gideon* v. *Wainwright,* 372 U.S. 335, 9 Led 2d 799, 83 SCt 792, to be confronted by witnesses against him, *Pointer* v. *Texas,* 380 U.S. 400, 13 Led 2d 923, 855 SCt 1065 (1965), to a speedy and public trial, *Klopfer* v. *North Carolina,* 386 U.S. 213, 18 Led 2d 1, 87 SCt 988, to compulsory process of witnesses, *Washington* v. *Texas,* 388 U.S. 24, 18 Led 2d 1019, 87 SCt 1920 (1967); the Fifth Amendment's right to remain silent, *Malloy* v. *Hogan,* 378 U.S. 1, 122 Led 2d 653, 84 SCt 1489 (1964); the Fourth Amendment's protection against unreasonable searches and seizures, *Mapp* v. *Ohio,* 367 U.S. 6431, 6 Led 2d 1081, 81 SCt 1684 (1961); the Eighth Amendment's restriction on cruel and unusual punishment, *Gidcon* v. *Wainwright,* supra, citing *Robinson* v. *California,* 370 U.S. 660, 8 Led 2d 758, 82 SCt 1417 (1962). Also see *Boykin* v. *Alabama,* supra, relating to procedural safeguards which the Supreme Court in *McCarthy* v. *U. S.,* supra, equated with due process of law.

the Fourteenth Amendment is set forth in *Benton* v. *State of Maryland* 395 U.S. 784 (1969), where it was held that the Fifth Amendment's double jeopardy provisions are engrafted on State criminal proceedings and thereby overruled *Palko* v. *Connecticut,* 302 U.S. 319 (1949). This court stated:

> "In an increasing number of cases, the Court has rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights . . . *Malloy* v. *Hogan,* 378 U.S. 1, 10-11, 12 Led 2d 653, 661, 84 SCt 1489 (1964). Only last term we found that the right to trial by jury in criminal cases was 'fundamental to the American scheme of justice'. *Duncan* v. *Louisiana,* 391 U.S. N5, 149, 20 Led 2d 491, 496 88 SCt 1444 (1968), and held that the Sixth Amendment right to a jury trial was applicable to the States through the Fourteenth Amendment. For the same reasons, we today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it could apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with holding, *Palko* v. *Connecticut* is overruled."
>
> ". . . Our recent cases have thoroughly rejected the Palko notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances do not disclose a denial of 'fundamental' fairness: Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice', * * * the same constitutional standards apply against both the State and Federal Governments. * * *"

* * *

The leading case in support of the view that the indictment clause of the Fifth Amendment is not applicable

to the States through the Fourteenth Amendment is *Hurtado* v. *California,* 110 U.S. 516.

In *Hurtado* this court considered whether the California Constitution providing, in part, for prosecution of offenses by information after examination and commitment by a magistrate was in violation of the Fifth and Fourteenth Amendments. The Penal Code of California made provision for an examination by a magistrate, in the presence of the accused, who is entitled to the aid of counsel and the right of cross examination of witnesses, whose testimony is to be reduced to writing; and upon a certification thereon by the magistrate that a described offense has been committed and that there is sufficient cause to believe the accused guilty thereof, requires an information to be filed against the accused.

After a historical discussion of the meaning of the phrase "due process of law" and its development under English and American tradition, history and law this court concluded:

> "Tried by these principals, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to cross-examination of the witnesses produced for the prosecution, is not due process of law. * * *; and in every circumstance of its administration, as authorized by the Statute of California, it carefully considers and guards the substantial interest of the prisoner. * * *" (Italics added)

A reading of *Hurtado* reveals that what really was decided was that the procedure authorized by California in prosecuting offenses by information met all the traditional

and historical concepts and principles of due process and was not repugnant to the due process clause of the Fourteenth Amendment. It was a proceeding strictly within its definitions. Even without arguing[4] with the conclusion reached in *Hurtado,* the court there was faced with a proceeding which secured to the accused rights, privileges and opportunities equal, and in some respects superior, to grand jury proceedings.

In a dissent which presaged decisions of this court embodying certain of the Bill of Rights in State criminal proceedings through the due process clause of the Fourteenth Amendment, Mr. Justice Harlan expressed the view that all provisions of the Bill of Rights securing to the citizen liberty and justice were included in the due process clause of the Fourteenth Amendment. (Justices Black and Douglas have expressed the view that the Fourteenth Amendment makes the Fifth Amendment in its entirety applicable to the States. See *Irvine* v. *California,* 347 U.S. 128, 139 (1954) and *Reagan* v. *New York,* 349 U.S. 58, 66.

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[4] It may well be argued that, like *Palko* v. *Connecticut,* supra, *Hurtado* has been overruled, or at least de-gutted, by the Supreme Court of the United States by the opinions cited in footnote (3), supra. This statement has support when one considers the statement of the Supreme Court in *Hurtado* to the effect that " * * * if in the adoption of that Amendment [14th] it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the 5th amendment, express declarations to that effect. * * * " (110 U.S. 516, 534 and 535). This reasoning, of course, has since been buried by the Supreme Court. See for example, the Supreme Court's statement in *Washington* v. *Texas,* 388 U.S. 14, 18 that " * * * at one time it was thought that the Sixth Amendment had no application to State criminal trials. That view no longer prevails. * * * "

Up to the present time, then, this court has extended to the States through the due process clause of the Fourteenth Amendment, the Fifth Amendment's right to remain silent, prohibition against double jeopardy and requirement of just compensation. All that remains is recognition that the indictment clause of the Fifth Amendment applies to the States through the Fourteenth Amendment.

We ask this Court to declare Section 769.2 as well as Amendment 3, 1884, of the Constitution of the State of Iowa, to be repugnant to the Fifth and Fourteenth Amendments of the Constitution of the United States.

If this court finds that Amendment 3, 1884, of the Constitution of Iowa is not in violation of the Fifth and Fourteenth Amendments, then we respectfully urge the Court to find that section 769.2 is in violation of the due process clauses of the Constitution of the State of Iowa, as well as the United States, in that, as authorized by the Iowa Code, it affords no protection whatsoever to the accused (in contrast to the California statute considered in *Hurtado,* supra) and leaves the accused at the whims, follies and fancies of a "one man grand jury" motivated by his own subjective moral, religious (see e.g. R.p. 33, 34 and 35) and philosophical views and uncontrolled or unchecked in any manner by an unbiased, detached magistrate who has no interest in the outcome of prosecutions.[5] As measured by the principles enunciated in *Hurtado,* it cannot be said that section 769.2 affords an accused due process of law.

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[5] From a statistical point of view and for comparison purposes, it is noted that, although a grand jury is available the first week of every quarter of each calendar year and are on call at the request of the county attorney at any time during the year they are in session, the number of indictments and no bills returned by the grand

CONCLUSION

WHEREFORE, for the aforegoing reasons we respectfully submit that the judgment be reversed.

Respectfully submitted,

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Attorney for Appellant.

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jury as contrasted to the number of informations returned by the county attorney in Linn County, Iowa were as follows:

	GRAND JURY		COUNTY ATTORNEY
	Indictments	*No Bills*	*Informations*
1967	46	34	277
1968	47	32	249
Jan.-Sept. 1969	21	18	199
	114	94	725

(R. 28 and 29)

Based on the above statistics it appears that the County attorney is deliberately by-passing the grand jury and it can be safely said that ones chances of getting a "fair" pre-charge hearing lies with the grand jury and not with the county attorney. For a good discussion of how the interest of an accused is better protected through indictment by grand jury than by county attorney's informations see 51 Iowa Law Review 199. Also based on the county attorney's stipulated testimony there was no emergency or urgency existing or extraordinary circumstances that would justify the by-passing of the grand jury with respect to the information returned in this case (or for that matter those that were dismissed.) (R. 29).

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed September 2, 1970
v.	)	66
JOSEPH GEORGE ABODEELY,	)	———
Appellant.	)	53864

Appeal from Linn District Court.
Harold D. Vietor, Judge.

Plaintiff pled guilty to aiding and abetting an attempt to produce an abortion. He was sentenced to five years in the penitentiary and fined $100. and costs. He now challenges the validity of the proceedings by way of appeal.

—AFFIRMED.

Arthur N. Nasser and Raymond J. Smith, of Chicago, and R. Fred Dumbaugh, of Cedar Rapids, for appellant.

Richard C. Turner, Attorney General, and Michael J. Laughlin, Assistant Attorney General, and William G. Faches, County Attorney, for appellee.

BECKER, J.

Defendant was charged by county attorney's information with aiding and abetting a confederate in an attempt to commit abortion. He pled guilty, was sentenced to an indeterminate sentence not to exceed five years in the Iowa State Penitentiary at Fort Madison, fined $100. and costs. Subsequently he filed motion in arrest of judgment and to vacate sentence. The motion was overruled. Plaintiff appeals. We affirm.

Defendant is accused of having confederated with Merle Jess Meyers and Donald Ray Geater in attempting to produce a miscarriage by Gloria Jean Judd. The record in this case indicates the attempt to produce an abortion by Miss Judd was one of a series of such acts all performed by the same men. The actual work on the women was done by Meyers with the assistance of Geater. The State charged defendant as an aider and abettor. The evidence indicates defendant acted as a referral source or procurer. The minutes of evidence indicate the State was prepared to prove defendant referred at least three women, other than Miss Judd, to Meyers and Geater.

During the course of the hearings, defendant admitted referring seven women over a three year period to Meyers and Geater. Defendant claims he received no financial gain. Evidence produced by the State at the hearing preparatory to sentencing indicates defendant did realize a financial gain and that he referred far more than the seven women he noted in his own testimony. One of the women, Mrs. Wright, died immediately after having been treated by these men.

The ensuing investigation culminated in charges against Meyers, Geater and defendant in connection with attempts to produce abortions by several women. Meyers was tried and convicted on a charge involving Miss Judd. He pled guilty to a second prosecution. Geater pled guilty to the Judd case and turned State's evidence. Thereafter, on October 24, 1968, defendant was charged in the instant case and in two other similar cases. On October 28, 1968 he personally appeared in court with his two attorneys, Ted V. Ruffin and R. Fred Dumbaugh.

Motion for change of venue, motion for bill of particulars and various other motions were filed. The change of venue was denied. The bill of particulars was granted as

to most requests. For some seven months pending rulings on these various motions defendant was out on bond and in frequent communication with his attorneys.

The trial court's findings of fact on all of these matters are fully supported by the record. Our independent examination of the record convinces us defendant frequently discussed the advisability of pleading not guilty and going to trial before a jury, the witnesses to be used against him, the fact they would be subject to cross-examination, the fact it would be best for him not to testify because, in the words of his lawyer, "he would have to admit under oath the very things that are the essence of the case. * * *." Defendant claimed he was innocent because he did not directly participate in the attempt to commit abortion and because he claimed he received no remuneration.

The defense attorneys told defendant they thought the court erred in not granting the change of venue, the action would probably be upheld by the Iowa Supreme Court, but might be cause for reversal before the United States Supreme Court. They told him he had a good chance to get probation but indicated the prosecutor would not so recommend. Mr. Ruffin told defendant that if the case went to jury trial he would withdraw because they would be just going through the forms but Mr. Dumbaugh, who is still an attorney of record, gave no such indication.

The case was set for trial on June 16, 1969. On June 12, 1969 defendant appeared in court with his attorneys, indicated he wanted to plead guilty and did so plead. Before accepting the plea, the court made extensive inquiry of defendant who said this was his own voluntary decision, there had been no threats or promises, he knew the punishment provided was a term not exceeding five years and a fine not exceeding $1000, he knew he might or might not get probation, he had discussed the matter with his attorneys and was satisfied with them.

At this point a matter came up that requires quotation from the record.[1]

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[1]"The Court: And are you satisfied with the representation that they have given you in this matter? The Defendant: I am. But I thought the charge was aid and abet. I see it's attempting.

"The Court: I might make an explanation on that. The charge is attempt to produce abortion and under the Iowa Code aiding and abetting in any crime is the crime itself. In effect, we don't have such a crime as aiding and abetting. The Defendant: I see.

"The Court: Do you want to take an opportunity to visit with your counsel regarding that? The Defendant: No, I guess not.

"The Court: I think I'd just as soon have you understand.

"(Mr. Dumbaugh and the defendant conferred.)

"Mr. Dumbaugh: That's the title of the particular section—

"The Court: The title of the section involved is attempt to produce abortion. That is the name.

"Mr. Dumbaugh: That's the name of the particular crime. Whether you aided or abetted or actually did it, you are still charged under the same section. Defendant: Is that charge or aid—

"The Court: Why don't you take a moment. Here's the Code, Mr. Dumbaugh, and go over the Code Section Chapter 701 and then I would suggest that you also go over Section Chapter 688. Mr. Dumbaugh: All right. Fine, Your Honor.

"The Court: Make sure that the defendant understands. (Mr. Dumbaugh and the defendant conferred.)

"The Court: Do you understand now. The Defendant: Yes, Sir.

"The Court: A very simple illustration: If Smith commits a robbery and Jones aids and abets him, Jones is guilty of robbery, too. All right. Are you satisfied with the representation— The Defendant: Yes, sir.

"The Court: —that Mr. Ruffin and Mr. Dumbaugh have given you in this case? The Defendant: Yes, sir.

"The Court: And do you understand that by pleading guilty you are admitting that you are in fact guilty and that you did aid and abet in the commission of this crime? The Defendant: Yes, sir."

At the subsequent presentence hearing on July 7, 1969 defendant reaffirmed his plea upon inquiry by the court. Defendant and nine other witnesses testified at the presentence hearing. The testimony of defendant and Geater, who appeared as a State's witness, was in serious conflict. The court suggested and defendant agreed to a polygraph test for both men by an operator agreed upon by the parties. The hearing recessed until July 24, 1969 while the test was conducted. Defense counsel chose the examiner. The hearing was resumed and at the conclusion thereof the court sentenced defendant. A parole was not granted. Subsequently, defendant obtained new counsel. Motion in arrest and to vacate was filed and overruled. This appeal followed.

THE GUILTY PLEA

I. Defendant attacks the proceeding surrounding the plea of guilty on three grounds: (1) the court failed to inform defendant of his constitutional rights; (2) the court did not inform defendant of the possible scope of punishment; and (3) the plea was involuntary and coerced.

The manner of factual determination of validity of the plea of guilty is primarily controlled here by the impact of three cases, McCarthy v. U. S., 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418; Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274, and State v. Sisco, (Iowa 1969) 169 N.W.2d 542.

The McCarthy case held rule 11 of the Federeal Rules of Criminal Procedure must be followed. The judge must personally make inquiry into the nature of defendant's understanding of the charge, the consequences of his plea and whether there is a factual basis for the plea. This is mandated in order to determine whether the plea is truly voluntary and to provide an adequate record for review.

The court expressly states it did not reach any constitutional considerations in deciding the case. Although McCarthy was decided April 2, 1969 before the plea in this case was taken, it was not binding on the trial court, nor is it binding on this court, because it limits itself to federal procedural problems. We recognized the constitutional overtones inherent in the case when we decided State v. Sisco, discussed infra. We do not abandon such recognition now.

State v. Sisco, supra, also examined a plea of guilty. We there relied heavily on McCarthy v. U.S., supra, recognized the binding effect of Boykin v. Alabama, supra, and adopted by judicial opinion the American Bar Association Project on Minimum Standards for Criminal Justice, Pleas of Guilty, Approved Draft, No.'s 1.4, 1.5 and 1.6 which require the court to personally address defendant and to follow certain procedures to make a satisfactory record as to the validity of the guilty plea.

State v. Sisco, supra, was decided July 24, 1969 after the plea of guilty here was taken. In State v. Jackson, (Iowa 1970) 173 N.W.2d 567, 570, we said:

"We hold, as we did in State v. Vantrump, supra, (Iowa 1969) 170 N.W.2d 453 that the guideline standards adopted in State v. Sisco apply only to guilty pleas entered after the date of that opinion, July 24, 1969. * * *."

Boykin v. Alabama, supra, is the third case of note. Boykin was decided June 2, 1969 before the plea was taken in this case. It is binding on us as a matter of United States constitutional law. We recognized this mandate in State v. Sisco, supra. Boykin v. Alabama undoubtedly requires that in all pleas of guilty in state courts the record must disclose defendant voluntarily and understandably entered his plea of guilty. Further, it must be

shown defendant knew he was waiving the privilege against self-incrimination, the right to trial by jury and the right to confront one's accusers. But the United States Supreme Court in Boykin did not attempt to impose a rule of criminal procedure mandating the manner by which the record was to be developed. This was left to the state courts and was met in Iowa by State v. Sisco, supra.

Although Sisco applies only to pleas entered after July 24, 1969 defendant is still entitled to a complete record at the time the plea is entered of the factors relevant in assisting the trial court and this court in making the constitutionally required determination that a defendant's guilty plea is voluntarily made. We therefore make the determination here in the light of the constitutional principles announced in Boykin v. Alabama, supra. When the record here is so examined it furnishes adequate support for the trial court's ultimate finding.

II. As the trial court observed, this is not a silent record. We have examined the original court reporter's transcripts as well as the record presented. The material supplies ample support for the trial court's ultimate finding.

Defendant is 38 years old; a high school graduate with three years of college training; an experienced business man of at least eight years. Parts of his business interests could at best be said to be operated on the fringes of the law. He had plead guilty to bootlegging. He knew Meyers had been tried to a jury and convicted. He knew Geater had pled guilty. He had numerous conferences with his two competent attorneys, he had been present at hearings on motions for continuance, for bill of particulars, to inspect evidence and for change of venue. The latter hearing involved use of affidavits and testimony of witnesses.

Defendant made an application for change of venue *on the grounds he could not get a fair and impartial jury,* supported the application by his own personal affidavit and sat through several days hearings thereon. We find defendant knew he was entitled to a jury trial and knew he was waiving this entitlement when he pled guilty.

III. Similarly, where defendant's attorneys testified they advised defendant he could not afford to take the stand and where the record reflects long conferences before defendant elected to plead guilty, we find defendant was aware of his fifth amendment right to remain silent.

IV. The same record supports the finding defendant knew he had a right to be confronted by his accusers. His participation in the hearing on motions for bill of particulars and to inspect exhibits belies any other finding. He also had actually attended an unrelated criminal trial for a short time and observed the trial procedure.

V. What has heretofore been said, plus the minutes of evidence, supports the court's finding that it had satisfied itself there was a factual basis for the crime charged and defendant's participation therein.

This case is factually distinguishable from State v. Sisco, supra. Defendant argues that the record here does not meet the requirement of personal inquiry by the court which is now required by State v. Sisco. Due to nonretroactivity, it does not need to meet those criteria. It does meet the requirements of Boykin v. Alabama, supra—which is sufficient for a plea taken before Sisco but after Boykin.

VI. Defendant's claim his plea was coerced and involuntary is without merit. Certainly defendant was in a difficult position as he faced trial. His attorneys recognized defendant's own story proved his guilt. The county

attorney was threatening to file notice of additional testimony which presumably would further detail defendant's connection with the crime charged. This filing was being held up pending defendant's decision on whether or not he would plead guilty. Subsequent hearings showed the State had a great deal of additional evidence to prove defendant's complicity in the crime charged and more than the seven referrals he admitted. The State also had evidence to prove defendant profited financially from his participation, a fact he denied.

The only possible avenue of defense would be, as present counsel suggests, failure to prove specific intent. This was then, and is now in retrospect, a very remote possibility. Such a decision involved a judgment determination.

Defendant's attorneys advised a guilty plea and an effort to obtain parole. They anticipated, and later received, dismissal of two companion charges. There was a good faith evaluation by counsel, their advise was taken. The fact the parole was not forthcoming does not affect the validity of the initial professional opinion given. State v. Lindsey, (Iowa 1969) 171 N.W.2d 859, and cases cited. Cf. Parker v. North Carolina, ... U.S. ....., 25 L.Ed. 2d 785; Brady v. U. S., ... U.S. ....., 25 L.Ed.2d 747 and McMann, Warden v. Richardson, ... U.S. ....., 25 L.Ed.2d 763, all decided by the Supreme Court of the United States on May 4, 1970.

VII. Defendant claims he was not advised of the range of punishment for the crime charged. Just before defendant entered his plea the following colloquy occurred:

"Mr. Abodeely, you are charged with attempt to produce abortion in violation of Iowa Code 701.1. That Code Section provides as punishment imprisonment in the peni-

tentiary for a term not exceeding five years and a fine in a sum not exceeding $1,000.00.

"Are you aware that that is the — The Defendant: Yes, sir.

"The Court: —punishment provision? The Defendant: (Nod in the affirmative.)

"The Court: You are charged with the offense of attempt to produce abortion in violation of Iowa Code Section 701.1. How do you plead? The Defendant: I plead guilty, Your Honor."

Only one possible sentence is involved. This was the literal import of the court's advice. We do not think defendant was misled in any way. He knew he had a chance for parole but the court was careful to inform defendant this would depend on the result of the presentence hearing. Beyond that he was told of the only punishment provided by statute. He indicated he understood.

In effect defendant argues the court should have explained the ramifications of the Indeterminate Sentence Law to defendant. While such procedure might have been advisable it was not essential. There was no error in this regard.

We hold defendant's plea was "made voluntarily and with full understanding of the consequences". Kercheval v. U.S., 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009.

CONSTITUTIONALITY OF SECTION 701.1, CODE, 1966

VIII. Defendant challenges the constitutionality of section 701.1, Code, 1966, which makes an attempt to produce an abortion a crime. The statute is challenged for vagueness and uncertainty and because it denies equal protection. In dealing with these two attacks we start from the premise that one who challenges a statute on constitutional

grounds assumes the burden to negate every reasonable basis to sustain it. A statute will not be declared invalid unless it is clearly, palpably and without doubt unconstitutional. State v. McNeal, (Iowa 1969) 167 N.W. 2d 674, 677; Lee Enterprises, Inc. v. Iowa State Tax Commission, (Iowa 1968) 162 N.W.2d 730, 737.

IX. The first constitutional attack is predicated on People v. Belous, (California 1969) 458 F.2d 194. The Supreme Court of California in a 4 to 3 decision held the phrase "unless the same is necessary to preserve her life" is unconstitutionally vague and uncertain. Our statutory phrase "unless such miscarriage shall be necessary to save her life" is substantially similar.

We are not persuaded by the majority opinion in People v. Belous, supra. The phrase found in the Iowa statute has been clear enough for satisfactory use for over 100 years. It should not now be the occasion for declaring the statute constitutionally invalid. This is the sense of two dissenting opinions in the California case. We agree.

We need not attempt to elaborate on the dichotomy set forth in the California opinions. A note in 51 Iowa L.Rev., 883, 901 states: "Only five jurisdictions in the United States have statutes which do not expressly allow abortions to save the life of the mother. In two of these states it has been held that the statute implied an exception to save life. * * *." To our knowledge no other state has seen fit to find the claimed offensive words vague and uncertain. We decline to do so now.

X. The "denial of equal protection" argument is predicated on our decisions interpreting this statute. State v. Dunklebarger, 206 Iowa 971, 974, 221 N.W. 592 states:

"* * * It follows also that, if a regular physician does make an examination, and does form an opinion, and does

act upon it, he is entitled to the presumption of correct judgment and good faith, until the contrary be proven. * * *." But no such presumption applies in favor of a person not a physician. State v. Rowley, 198 Iowa 613, 199 N.W. 369. We again refer to the note in 51 Iowa L. Rev. at page 898:

"Section 701.1 does not distinguish abortions attempted by physicians from those attempted by laymen. However, the Supreme Court of Iowa has held that if a regular physician makes an examination, and acts upon it, he is entitled to the presumption of correct judgment and good faith, thereby falling under the therapeutic exception. If the defendant is not a physician, there will be no such presumption. This is a sound distinction because the absence of medical skill adds to the risk of injury. * * *."

The legislature may make reasonable classifications between citizens affected by legislation. If the law operates equally upon all within the same class there is uniformity in the constitutional sense. Dickinson v. Porter, (1949) 240 Iowa 393, 400, 35 N.W.2d 66, 72; State v. Wrenn, (1922) 194 Iowa 552, 554, 188 N.W. 697, affirmed Wrenn v. State, 263 U.S. 688, 44 S.C. 228, 68 L.Ed. 507. The classification imposed on the statute by this court's interpretation is neither unreasonable nor arbitrary. The cases noted do not make the statute unconstitutional.

CONSTITUTIONALITY OF CHAPTER 769 PROSECUTION BY COUNTY ATTORNEY'S INFORMATION

XI. Use of the county attorney's information is said to be violative of the United States Constitution, Amendment 5, made applicable to the states by Amendment 14. This challenge has been made before in State v. Allnutt, (Iowa)

158 N.W.2d 715; Hoskins v. Bennett, 256 Iowa 1370, 1376, 131 N.W.2d 510; Kotek v. Bennett, 255 Iowa 984, 988, 124 N.W.2d 710, appeal dismissed and certiorari denied, 376 U.S. 188, 84 S.Ct. 637, 11 L.Ed.2d 715. In the latter case we said: " * * * County attorney informations, to be effective, must be approved by a judge of the district court (section 769.7) and the rights of an accused are amply protected by other provisions of chapter 769 of our Code. Also see 49 Iowa Law Rev. 14, at page 23."

The United States Supreme Court's last definite pronouncement on this subject was Hurtado v. California, (1884) 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed.232. The use of the California prosecutor's information was held not to violate the United States Constitution, Amendment 5. In Benton v. State of Maryland, (1969) ..... U.S. ....., 89 S.Ct. 2056, 23 L.Ed.2d 707 the court said:

"Recently, however, this Court has 'increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law.' Washington v. Texas, 388 U.S. 14, 18, 18 L.Ed2d 1019, 1022, 87 S.Ct. 1920 (1967). * * *.

"* * * Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' Duncan v. Louisiana, supra, at 149, 20 L. Ed. 2d at 496, the same constitutional standards apply against both the State and Federal Governments. * * *."

Prosecution by indictment has not been found to be so "fundamental to the American scheme of justice" as to come within the ambit of the Fourteenth Amendment. Prosecution by information has not been proscribed by federal edict. On the basis of both reason and authority we again hold the Iowa county attorney's information procedure valid.

CONSTITUTIONALITY OF INDETERMINATE SENTENCE LAW

XII. Defendant's final attack on the Iowa statutes on constitutional grounds is leveled against the Indeterminate Sentence Law, Code, 1966, § 189.13. He argues the power and discretion of the court has been usurped by the Parole Board, there is no guarantee the Board will follow any recommendations the court might make and this might well result in a full five years of incarceration. He argues this would be cruel and unusual punishment under the facts of this case. We disagree.

The powers of the court have not been usurped but the determination of length of incarceration has been delegated to the Parole Board. This has been adjudicated a constitutional delegation of power and authority to an administrative body. State v. Duff, 144 Iowa 142, 122 N.W. 829. We do not believe the sentence results in cruel and unusual punishment in light of the facts noted ante.

We find no reversible error in this case.—AFFIRMED.

All Justices concur, except Rees, J., who takes no part.

APPENDIX B

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee,	)	
v.	)	No. 53864
JOSEPH GEORGE ABODEELY, Defendant-Appellant.	)	

ORDER

Petition for rehearing in the above case has been filed and considered. The court notes Point VIII raises a new constitutional argument challenging the validity of the Iowa Criminal Abortion Statute, Code of Iowa, 1966, section 701.1. These arguments concerning a woman's right to privacy, and the United States Constitution, Ninth Amendment rights which are held to be relevant in Babbitz v. McCann, 310 F.Supp. 293, are all raised for the first time in the Petition for Rehearing. Under the procedural and factual background in this case we decline to consider these arguments for the first time on rehearing.

Motion for rehearing denied.

Done this 15th day of October, 1970.

C. Edwin Moore
Chief Justice—Iowa Supreme Court

Copies to: Richard C. Turner
William G. Faches
Arthur N. Nasser and
Raymond J. Smith
R. Fred Dumbaugh